

**38 CFR Part 17****RIN 2900-AR57****Reproductive Health Services****AGENCY:** Department of Veterans Affairs**ACTION:** Interim final rule with request for comments.

**SUMMARY:** The Department of Veterans Affairs (VA) amends its medical regulations to remove the exclusion on abortion counseling and establish exceptions to the exclusion on abortions in the medical benefits package for veterans who receive care set forth in that package, and to remove the exclusion on abortion counseling and expand the exceptions to the exclusion on abortions for Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) beneficiaries.

**DATES:** *Effective date:* This interim final rule is effective [insert date of publication in the Federal Register].

*Comment date:* Comments must be received on or before [insert date 30 days after the date of publication in the *FEDERAL REGISTER*].

**ADDRESSES:** Comments may be submitted through [www.regulations.gov](https://www.regulations.gov). Except as provided below, comments received before the close of the comment period will be available at [www.regulations.gov](https://www.regulations.gov) for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. VA encourages individuals not to submit

duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

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**SUPPLEMENTARY INFORMATION:**

I. Background

A. Brief Summary of this Interim Final Rule

On June 24, 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Dobbs*, 142 S. Ct. at 2279. After *Dobbs*, certain States have begun to enforce existing abortion bans and restrictions on care, and are proposing and enacting new ones, creating urgent risks to the lives and health of pregnant veterans and CHAMPVA beneficiaries in these States. In response, VA is acting to help to ensure that, irrespective of what laws or policies States may impose, veterans who receive the care set forth in the medical benefits package will be able to obtain abortions, if determined needed by a health care professional, when the life or the health of the pregnant veteran would be endangered if the pregnancy were carried to term or the pregnancy is the result of an act of rape or incest. Similarly, VA is acting to ensure CHAMPVA beneficiaries will be able to obtain abortions, if determined medically necessary and appropriate, when the health of the pregnant CHAMPVA beneficiary would be endangered if the pregnancy were carried to term or the pregnancy is the result of an act of rape or incest.

VA is taking this action because it has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans.

See section 1710 of title 38, United States Code (U.S.C.); § 17.38(b) of title 38, Code of Federal Regulations (CFR). As abortion bans come into force across the country, veterans in many States are no longer assured access to abortion services in their communities, even when those services are needed. VA has determined that an abortion is “needed” pursuant to 38 U.S.C. 1710, when sought by a veteran, if determined needed by a health care professional, when the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term or when the pregnancy is the result of an act of rape or incest. Unless VA removes its existing prohibitions on abortion-related care and makes clear that needed abortion-related care is authorized, these veterans will face serious threats to their life and health.

Similarly, VA has determined that providing access to abortion-related medical services is medically necessary and appropriate to protect the health of CHAMPVA beneficiaries. See 38 U.S.C. 1781; 38 CFR 17.270(b) (defining “CHAMPVA-covered services and supplies” as “those medical services and supplies that are medically necessary and appropriate for the treatment of a condition and that are not specifically excluded under [38 CFR 17.272(a)(1)] through (84)”). CHAMPVA beneficiaries in many States are also no longer assured access to abortion services in their communities. Unless VA removes existing prohibitions on abortion-related care and makes clear that medically necessary and appropriate abortion-related care is authorized, these CHAMPVA beneficiaries will face serious threats to their health.

VA is therefore taking this action to avert imminent and future harm to the veterans and CHAMPVA beneficiaries whose interests Congress entrusted VA to serve.

B. VA Authority to Provide Abortions and Abortion Counseling under 38 U.S.C. 1710 (Medical Benefits Package)

Pursuant to VA’s general treatment authority for veterans, VA “shall furnish” specified veterans with “hospital care and medical services which the Secretary

determines to be needed.” 38 U.S.C. 1710(a)(1)–(2). For veterans not described in paragraphs (1) and (2), the Secretary “may,” subject to certain limitations, “furnish hospital care” and “medical services . . . which the Secretary determines to be needed.” 38 U.S.C. 1710(a)(3). As relevant here, such “medical services” include “medical examination, treatment,” “[s]urgical services,” and “[p]reventive health services.” 38 U.S.C. 1701(6).

VA implements its general treatment authority, and the Secretary determines what care is “needed,” 38 U.S.C. 1710(a)(1)–(3), by regulation through VA’s medical benefits package. 38 CFR 17.38. The medical benefits package consists of a wide range of basic and preventive care, including inpatient and outpatient medical and surgical care, prescription drugs, emergency care (as authorized by statute and regulation), pregnancy and delivery services (to the extent authorized by law)<sup>1</sup>, and periodic medical exams. 38 CFR 17.38(a). Care included in the medical benefits package is “provided to individuals only if it is determined by appropriate health care professionals that the care is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice.” 38 CFR 17.38(b).

Some care is specifically excluded from the medical benefits package because the Secretary has determined it is not “needed” within the meaning of 38 U.S.C. 1710(a)(1)–(3). 38 CFR 17.38(c); 64 FR 54207, 54210 (Oct. 6, 1999). Among other services, “[a]bortions and abortion counseling” are currently excluded from the medical benefits package, with no exceptions. 38 CFR 17.38(c)(1).

VA first established the medical benefits package in 1999. 64 FR 54217. The Veterans’ Health Care Eligibility Reform Act of 1996, Pub. L. 104-262, 10 Stat. 3177,

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<sup>1</sup> The language “to the extent authorized by law” in 38 CFR 17.38 means to the extent VA has legal authority to provide such services under 38 U.S.C. 1710. 64 FR 54210 (Nov. 10, 1999).

mandated that VA implement a national enrollment system to manage the delivery of health care services to eligible veterans. When VA developed regulations to implement this national enrollment system, VA recognized the need to also regulate the health care services it provided. 64 FR 54210. VA did not explain the rationale behind the exclusion of abortions and abortion counseling from the medical benefits package when it was established in 1999. At the time, *Roe* had been reaffirmed in relevant part by *Casey*, and VA was aware that veterans of reproductive age enrolled in its health care system could access abortion services in their communities.

After the *Dobbs* decision, however, veterans living in States that ban or restrict abortion services may no longer be able to receive such medical services in their communities, including in States that now restrict access to abortion even in cases of rape or incest or where the health of the pregnant individual is in danger. It is thus essential for the lives and health of our veterans that abortions be made available if determined needed by a health care professional when: (1) the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term; or (2) the pregnancy is the result of an act of rape or incest. VA has also determined that abortion counseling is needed so that veterans can make informed decisions about their health care.

VA has determined that such medical care is “needed” within the meaning of VA’s general treatment authority, 38 U.S.C. 1710(a). This means that such care may be provided if an appropriate health care professional determines that such care is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice. 38 CFR 17.38(b)(1)–(3). VA can therefore provide abortion counseling and covered abortions pursuant to 38 U.S.C. 1710 and 38 CFR 17.38.

The Veterans Health Care Act of 1992, Pub. L. 102-585, 106 Stat. 4943 (VHCA), does not prohibit VA's amendment of its medical benefits package in this manner. When that law was enacted in 1992, prior to the 1996 enactment of the Veterans' Health Care Eligibility Reform Act, VA health care was subject to a patchwork of eligibility criteria, and care was largely linked only to service-connected conditions. See 38 U.S.C. 1710 (Supp. I 1994) (authority under which hospital and nursing home care were provided prior to 1996); 38 U.S.C. 1712 (Supp. I 1994) (authority under which medical services were provided prior to 1996). The VHCA, in relevant part, was designed to improve the health care services available to women veterans.<sup>2</sup> Section 106(a) of the VHCA stated that VA could provide "women" with "[p]apanicolaou tests (pap smears)," "[b]reast examinations and mammography," and "[g]eneral reproductive health care . . . , but not including under this section infertility services, abortions, or pregnancy care (including prenatal and delivery care), except for such care relating to a pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition." Pub. L. 102-585, sec. 106(a).<sup>3</sup>

Section 106 did not limit VA's authority to provide care under any other provision of law. The "but not including" language in section 106 of the VHCA limited only the services provided "under this section," meaning that while section 106 barred the provision of any abortion or infertility service under section 106 of the VHCA, it did not limit VA's authority to provide such services under any other statutory provision such as

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<sup>2</sup> 102 CONG. REC. 32,367 (1992).

<sup>3</sup> Prior to the enactment of section 106(a), VA provided gynecology services, including mammograms and screening for cervical cancer, under the Department's authority to provide preventative health services pursuant to 38 U.S.C. 1762. General Accounting Office (GAO)/Human Resources Division (HRD)-92-23 *VA Health Care for Women: Despite Progress, Improvements Needed* (January 1992) p. 3 (<https://www.gao.gov/assets/hrd-92-23.pdf>). However, the legislative history of the VHCA generally, and section 106 specifically, indicates that Congress sought to provide statutory support for the services VA already provided pursuant to its existing authority. SENATE REPORT NO. 102-409, p. 40 (1992) (discussing the intent behind S. 2973, section 201, *Well-women care services*, "The Committee expects that providing explicit authority to furnish cancer-screening procedures will lead VA to redouble its efforts in this critical area. The Committee believes that these services are not only vital to women veterans, but they are also in line with VA's goal to emphasize preventative health-care services within the system."); see also 102 CONGRESSIONAL RECORD 34,299 (1992) ("The measure also incorporates the exception to the bar on furnishing pregnancy care reflected in VA regulations (at 39 CFR sec. 17.48(h) [sic]) associated with care relating to a complicated pregnancy, as well as the instance in which the risks of complication are increased by a service-connected condition.").

38 U.S.C. 1710 or 38 U.S.C. 1712. Pub. L. 102-585, sec. 106(a). Consequently, a veteran might have been eligible for infertility services for a service-connected disability under 38 U.S.C. 1712,<sup>4</sup> even though that veteran would have been ineligible for infertility services under section 106 because of that section's exclusions. VA has consistently interpreted section 106 in this fashion.<sup>5</sup>

In 1996, the Veterans' Health Care Eligibility Reform Act made major changes to eligibility for VA health care and, as noted above, directed VA to establish a system of patient enrollment to manage the provision of care. The purpose behind eligibility reform was to replace the old system with a system where an enrolled veteran could receive whatever medical care and services are deemed needed. See House of Representatives Report No. 104-690, at 4 (1996) ("[The Act] would substitute a single uniform eligibility standard for the complex array of standards governing access to VA hospital and outpatient care. While the new standard is a simple one, more importantly, it employed a clinically appropriate 'need for care' test, thereby ensuring that medical judgment rather than legal criteria will determine when care will be provided and the level at which that care will be furnished."); *id.* at 13 ("[The Act] would substitute a single, streamlined eligibility provision—based on clinical need for care—for the complex array of disparate rules currently governing veterans' eligibility for hospital and outpatient care."). The Veterans' Health Care Eligibility Reform Act effectively overtook section 106 of the VHCA.<sup>6</sup> For example, a veteran in 1992 was only eligible for pregnancy and delivery care under section 106 if the pregnancy was complicated or the risks of complication were increased by a service-connected condition. Pub. L. 102-

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<sup>4</sup> 102 CONGRESSIONAL RECORD 34,299 (1992).

<sup>5</sup> Veterans Health Administration (VHA) Directive 10-93-151, December 6, 1993; Letter from Secretary Denis McDonough to Senator Jerry Moran, July 7, 2021.

<sup>6</sup> As detailed above, section 106 of the VHCA was intended to reinforce VA's existing authority to provide preventative health care services to women veterans. See 38 U.S.C. 1762; 38 CFR 17.30(m)(1); Pub. L. 102-585, sec. 513. The subsequent 1996 amendments to 38 U.S.C. 1710 and the 1999 rulemaking establishing the medical benefits package overtook VA's need to rely on section 106 to provide certain women's health care to women veterans.

585, sec. 106(a). In contrast, general pregnancy and delivery services were included in the medical benefits package when it was established in 1999 pursuant to VA's authority in 38 U.S.C. 1710. 64 FR 54210; 38 CFR 17.38(a)(1)(xiii). Moreover, while section 106 of the VHCA provided that infertility services could not be provided under that section, infertility services (with the exception of in vitro fertilization) were also included in the medical benefits package pursuant to VA's authority under 38 U.S.C. 1710. *Id.* Consequently, for decades, VA has offered general pregnancy care and certain infertility services under 38 U.S.C. 1710. *Id.* VA no longer relies on section 106 of the VHCA to provide such services or any other services.

Congress has ratified VA's interpretation that section 106 of the VHCA does not limit the medical care that the VA may provide pursuant to its authority under 38 U.S.C. 1710. Most recently, when Congress enacted the Deborah Sampson Act of 2020, Pub. L. 116-315, tit. V (2021), it created a central office to, inter alia, "monitor[] and encourag[e] the activities of the Veterans Health Administration with respect to the provision, evaluation, and improvement of health care services provided to women veterans by the Department." 38 U.S.C. 7310(b)(1). Congress defined "health care" for these purposes as "the health care and services included in the medical benefits package provided by the Department as in effect on the day before the date of the enactment of this Act [Jan. 5, 2021]." 38 U.S.C. 7310 note.<sup>7</sup> Given that VA's medical benefits package as of that date included services that were excluded from the coverage of Section 106 of the VHCA, Congress ratified VA's interpretation that it may provide for these services pursuant to its authority under 38 U.S.C. 1710, notwithstanding section 106. Indeed, the fact that the Deborah Sampson Act of 2020

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<sup>7</sup> 38 U.S.C. 7310(b)(6) authorizes the Office of Women's Health to "promote the expansion and inclusion of clinical . . . activities of [VHA]." Additionally, subsection (b)(9) authorizes the Office to "carry out such other duties as the Under Secretary for Health may require." Thus, the Office of Women's Health can address health care and services that were not included in the medical benefits package on the day before the date of enactment of the Deborah Sampson Act of 2020.



did not reference section 106 of the VHCA and only referenced VA's medical benefits package shows that Congress did not interpret section 106 of the VHCA as a limitation on VA's authority to provide care to "women veterans."<sup>8</sup>

Furthermore, the fact that VA does not rely on section 106 of the VHCA and instead relies on 38 U.S.C. 1710(a)(1)–(3) to provide pap smears, breast exams and mammography, or general reproductive health services, pregnancy or infertility services confirms that section 106's prohibition on providing certain services "under this section" simply is no longer operative.

VA's authority under 38 U.S.C. 1710 is different from authorities governing the provision of health care by other Federal agencies. Pursuant to the 1996 amendment, by statute, VA "shall" (and, for some categories of veterans, "may") furnish care that "the Secretary determines to be needed" to veterans, with no exclusion for abortion. 38 U.S.C. 1710(a)(1)–(3). Other Federal agencies, by contrast, are subject to underlying statutory restrictions or restrictions in their appropriations acts concerning certain abortions. For instance, Federal funds available to the Departments of Labor, Health and Human Services, and Education are subject to an appropriations restriction known as the "Hyde Amendment." Congress has included the Hyde Amendment in those agencies' annual appropriations legislation for more than forty years. In its current form, the Hyde Amendment provides that no covered funds "shall be expended for any abortion" or "for health benefits coverage that includes coverage of abortion," except "if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." Consolidated Appropriations Act, 2022, Pub. L. 117-103, Div. H,

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<sup>8</sup> Letter to Denis McDonough from 24 U.S. Senators, July 28, 2022.

secs. 506–07, 136 Stat. 49. The breadth of the Hyde Amendment’s exception has varied over the years, but since fiscal year 1994, the Hyde Amendment has included an exception for the life of the woman and for pregnancies resulting from acts of rape or incest. See, e.g., Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. 103-112, Sec. 509, 107 Stat. 1082, 1113 (1993). No similar statutory restriction applies to VA.

C. VA Authority to Provide Abortions and Abortion Counseling for CHAMPVA Beneficiaries

By statute, VA’s “Secretary is authorized to provide” specified “medical care” to certain spouses, children, survivors, and caregivers of veterans who meet specific eligibility criteria. 38 U.S.C. 1781(a). This health benefits program is known as CHAMPVA. VA must provide “for medical care” under CHAMPVA “in the same or similar manner and subject to the same or similar limitations as medical care is” provided by the Department of Defense to active-duty family members, retired service members and their families, and others under the TRICARE (Select) program. 38 U.S.C. 1781(b); see 32 CFR 199.1(r), 199.17(a)(6)(ii)(D). VA has regulated services covered by CHAMPVA to mean those medical services that are medically necessary and appropriate for the treatment of a condition and that are not specifically excluded. 38 CFR 17.270(b).

The current CHAMPVA regulations exclude coverage for abortions, except when a physician certifies that the abortion was performed because the life of the woman would be endangered if the fetus were carried to term, 38 CFR 17.272(a)(64), and also exclude coverage for abortion counseling, 38 CFR 17.272(a)(65). The current CHAMPVA regulations do not include coverage for abortions when the pregnancy is the result of an act of rape or incest.

In contrast, TRICARE (Select) provides coverage for abortions when the pregnancy is the result of an act of rape or incest, or when a physician certifies that the life of the woman would be endangered if the fetus were carried to term, and it provides coverage for counseling for covered abortions.<sup>9</sup>

In this rule, VA amends its CHAMPVA regulations by removing the exclusion for abortion counseling and permitting abortions when the health of the pregnant beneficiary would be endangered if the pregnancy were carried to term, or when the pregnancy is the result of an act of rape or incest. This amendment will better align coverage under CHAMPVA with coverage under TRICARE (Select).

Coverage under CHAMPVA will deviate from coverage under TRICARE (Select) because CHAMPVA will cover abortions when the health of the CHAMPVA beneficiary is at risk and will cover abortion counseling for non-covered abortions. VA, however, has determined that, overall, the relevant care provided under CHAMPVA will still be sufficiently “similar” to that provided under TRICARE (Select). 38 U.S.C. 1781(b). Section 1781(b) does not require CHAMPVA and TRICARE (Select) to be administered identically. Rather, by referring to care that is “similar,” the statute permits VA flexibility to administer the program for CHAMPVA beneficiaries. For this reason, not every aspect of CHAMPVA will find a corollary in TRICARE (Select).

VA has previously deviated from TRICARE (Select) in amending its CHAMPVA regulations to provide care that goes beyond the benefits offered by TRICARE (Select). Generally, VA determined that these deviations were necessary to best provide services to the CHAMPVA population while remaining “similar” to TRICARE (Select). For example, TRICARE (Select) does not include an annual physical exam benefit for all TRICARE (Select) beneficiaries; instead, that benefit is limited to certain

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<sup>9</sup> *Covered Services, Abortions*, TRICARE, <http://tricare.mil/CoveredServices/IsItCovered/Abortions> (last visited Aug. 22, 2022).

circumstances.<sup>10</sup> VA has exercised its discretion to deviate from TRICARE (Select) and provide annual physical exams to all CHAMPVA beneficiaries. 38 CFR 17.272(30)(xiii). VA did not believe that limiting the provision of annual exams was appropriate from a clinical perspective. 83 FR 2396, 2401 (Jan. 17, 2018). Annual physical exams are beneficial for both CHAMPVA beneficiaries and VA because they may identify serious medical issues before they progress. *Id.* Additionally, TRICARE (Select) does not waive beneficiary costs associated with preventive services for TRICARE (Select) beneficiaries who are Medicare-eligible in cases in which those services are not covered by Medicare. VA's CHAMPVA regulations, however, do waive cost-sharing requirements for preventive services for Medicare-eligible beneficiaries. VA determined that enforcing cost-sharing requirements for Medicare-eligible beneficiaries for preventive services would unfairly disadvantage them as compared to CHAMPVA beneficiaries with other health insurance. 83 FR 2404.

Thus, VA has previously regulated to provide CHAMPVA benefits beyond those benefits offered by TRICARE (Select) if providing such health care would better promote the long-term health of CHAMPVA beneficiaries. In so doing, VA is still providing for health care in a manner similar to TRICARE (Select), but the care is being provided in a manner that best serves the CHAMPVA population. Similarly, here, VA is aligning CHAMPVA benefits with TRICARE (Select) benefits in certain ways, VA is also providing benefits beyond those offered by TRICARE (Select) in order to better promote the long-term health of CHAMPVA beneficiaries. For the reasons discussed further below, VA finds that allowing abortions for CHAMPVA beneficiaries when there is a risk to the CHAMPVA beneficiary's health and providing abortion counseling for both covered and noncovered abortions is both medically necessary and appropriate to promote the long-term health of CHAMPVA beneficiaries.

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<sup>10</sup> *Covered Services, Physicals*, TRICARE, <http://tricare.mil/CoveredServices/IsItCovered/Physicals> (last visited Aug. 22, 2022).

## II. Abortions in Limited Circumstances under 38 U.S.C. 1710 and 1781

### A. Abortions when the Life or Health of the Pregnant Veteran Would Be Endangered if the Pregnancy Is Carried to Term are Needed

VA has determined that access to abortions is “needed,” 38 U.S.C. 1710(a)(1)–(3), and such care may be provided to veterans when an appropriate health care professional determines that such care “is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice,” 38 CFR 17.38(b), when the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term. Abundant evidence supports VA’s determination.

Research has shown that while most pregnancies progress without incident, pregnancy and childbirth in the United States can result in physical harm and even death for certain pregnant individuals. From 1998 to 2005, the U.S. mortality rate associated with live births was 8.8 deaths per 100,000 live births, and maternal mortality rates have increased staggeringly since then.<sup>11</sup> A 2019 study reviewed mortality data from 2007 to 2015 from the National Association for Public Health Statistics and Information Systems, which includes information on all deaths in the 50 States and the District of Columbia (D.C.). The data showed that, during this time, within 38 States and D.C., the maternal mortality rate rose to 17.9 deaths of individuals per 100,000 live births. This study identified the factors that likely contributed to this rising maternal mortality rate, including reduced access to family planning and reproductive health

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<sup>11</sup> Elizabeth G Raymond & David A Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012); see also Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 OBSTETRICS & GYNECOLOGY 447 (2016) (finding a 26.6 percent increase in maternal mortality rates between 2000 and 2014).

services through abortion clinic closures and legislation restricting abortions based on gestational age.<sup>12</sup>

Individuals at risk of pregnancy complications who do not have access to contraception or abortion may experience conditions resulting from pregnancies that can leave them at risk for loss of future fertility, significant morbidity, or death. According to the American College of Obstetricians and Gynecologists (ACOG) and Physicians for Reproductive Health, there are situations when pregnancy termination, in the form of treatment that may be considered to be an abortion, is the only medical intervention that can preserve a patient's health or save their life.<sup>13</sup> Pregnancy poses significant physiological changes on an individual's body, which can exacerbate underlying or preexisting conditions, like renal or cardiac disease, and can severely compromise health or even cause death.<sup>14</sup> During pregnancies, individuals may suffer from life-threatening conditions such as severe preeclampsia, newly diagnosed cancer requiring prompt treatment, and intrauterine infections.<sup>15</sup> Preeclampsia is a disorder associated with new-onset hypertension that can result in blood pressure swings, liver issues, and seizures, among other conditions.<sup>16</sup>

Some pregnant veterans may be at heightened risk for other pregnancy complications including hemorrhage, placenta accreta spectrum, and peripartum hysterectomy, among others.<sup>17</sup> Notably, the need for peripartum hysterectomy in such

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<sup>12</sup> Summer Shelburne Hawkins et al., *Impact of State-Level Changes on Maternal Mortality: A Population-Based, Quasi-Experimental Study*, AM. JOURNAL OF PREVENTIVE MEDICINE. 85(2): 165–74 (2019).

<sup>13</sup> *Abortion Can Be Medically Necessary*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, Sep. 25, 2019, <http://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary> (last visited Aug. 22, 2022).

<sup>14</sup> Victoria L. Meah, et al., *Cardiac output and related haemodynamics during pregnancy: a series of meta-analyses*, HEART J., 102:518-526 (2016).

<sup>15</sup> *Abortions later in Pregnancy*, KAISER FAMILY FOUNDATION, Dec. 5, 2019, <http://www.kff.org/womens-health-policy/fact-sheet/abortions-later-in-pregnancy/> (last visited Aug. 22, 2022).

<sup>16</sup> ACOG Practice Bulletin No. 222, *Gestational Hypertension and Preeclampsia*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Dec. 2018).

<sup>17</sup> ACOG Practice Bulletin No. 183, *Postpartum Hemorrhage*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Oct. 2017); ACOG Obstetric Care Consensus, *Placenta Accreta Spectrum* (July 2012, reaff'd 2021); ACOG Practice Bulletin No. 198, *Prevention and Management of Obstetric Lacerations at Vaginal Delivery*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS

instances would cause not only morbidity, but loss of future fertility. Pregnancy-related complications may endanger the pregnant veteran's life or health. Abortion may be needed to protect the life or health of the pregnant veteran in these and other circumstances.

Veterans of reproductive age, in particular, have high rates of chronic medical and mental health conditions that may increase the risks associated with pregnancy.<sup>18</sup> Such conditions include chronic post-traumatic stress disorder, severe hypertension, and chronic renal disease.<sup>19</sup> When a health care professional determines that these conditions (potentially in combination with other factors) render an abortion needed to preserve the health of a veteran, access to an abortion is essential health care.

For all of the reasons discussed above, research supports the conclusion that an abortion may be needed to save the life or preserve the health of a veteran. 38 CFR 17.38(b). Therefore, VA is revising the medical benefits package to allow the provision of abortions in such circumstances.

B. Abortions When the Health of the Pregnant CHAMPVA Beneficiary Would be Endangered if the Pregnancy Is Carried to Term are Medically Necessary and Appropriate

Currently, abortions for CHAMPVA beneficiaries are excluded “except when a physician certifies that the life of the mother would be endangered if the fetus were carried to term.” 38 CFR 17.272(a)(64). VA has determined that when the health of the pregnant CHAMPVA beneficiary would be endangered if the pregnancy were carried to

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(Sept. 2018); ACOG Clinical Consensus No. 1, *Pharmacologic Stepwise Multimodal Approach for Postpartum Pain Management*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Sept. 2021).

<sup>18</sup> Joan L. Combellick, et al., *Severe Maternal Morbidity Among a Cohort of Post-9/11 Women Veterans*, J WOMEN'S HEALTH, 29(4):577–84 (Apr. 2020).

<sup>19</sup> Jonathan Shaw, et al., *Post-traumatic Stress Disorder and Antepartum Complications: a Novel Risk Factor for Gestational Diabetes and Preeclampsia*, PAEDIATR PERINAT EPIDEMIOL. 31(3):185-194 (May 2017); David Jones & John P. Hayslett, *Outcome of pregnancy in women with moderate or severe renal insufficiency*, N ENGL J MED. 25;335(4):226-32 (Jul. 1996).

term, access to abortions is also medically necessary and appropriate and such abortions should be covered CHAMPVA services. As explained above, VA is required to provide medically necessary and appropriate care under CHAMPVA to certain spouses, children, survivors, and caregivers of veterans who meet specific eligibility criteria. 38 U.S.C. 1781(a); 38 CFR 17.270 *et seq.* While this care must be “in the same or similar manner and subject to the same or similar limitations as medical care is” provided by the Department of Defense under TRICARE (Select), 38 U.S.C. 1781(b), VA has consistently maintained that “similar” does not mean “identical.” VA requires that such care be medically necessary and appropriate for the treatment of a condition and not be specifically excluded under the CHAMPVA regulations. See 38 CFR 17.270(b) (defining CHAMPVA-covered services and supplies).

As discussed in the prior section, an abortion may be medically necessary and appropriate to protect a pregnant individual’s health. Pregnancy can exacerbate underlying or preexisting conditions, like renal or cardiac disease, in such a way as to severely compromise the health of an individual.<sup>20</sup> Additionally, pregnant individuals may have their health endangered due to severe preeclampsia, newly diagnosed cancer requiring prompt treatment, and intrauterine infections.<sup>21</sup> In those circumstances, an abortion may be the only treatment available to protect the health of the pregnant CHAMPVA beneficiary. Thus, there may be instances when an abortion may be medically necessary and appropriate to prevent a pregnant CHAMPVA beneficiary’s health from being endangered if the pregnancy was carried to term, and VA finds it necessary to deviate from TRICARE (Select) to provide abortions in these circumstances.

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<sup>20</sup> Victoria L. Meah, et al., *Cardiac output and related haemodynamics during pregnancy: a series of meta-analyses*, HEART J., 102:518-526 (2016).

<sup>21</sup> *Abortions later in Pregnancy*, KAISER FAMILY FOUNDATION, Dec. 5, 2019. <http://www.kff.org/womens-health-policy/fact-sheet/abortions-later-in-pregnancy/> (last visited Aug. 22, 2022).



Accordingly, consistent with VA's regulatory requirements in 38 CFR 17.270(b), VA is revising the CHAMPVA regulations to allow the provision of abortions in such circumstances.

C. Abortions for Veterans When the Pregnancy is the Result of an Act of Rape or Incest Are Needed

VA has also determined that access to abortions is “needed,” 38 U.S.C. 1710(a)(1)–(3), and such care may be provided in accordance with 38 CFR 17.38(b), when the pregnancy is the result of an act of rape or incest.

There are severe health consequences associated with being forced to carry a pregnancy that is the result of rape or incest to term, including constant exposure to the violation committed against the individual which can cause serious traumatic stress and a risk of long-lasting psychological conditions such as anxiety and depression.<sup>22</sup> Those mental health consequences have a unique impact on veterans, who report higher rates of sexual trauma compared to their civilian peers.<sup>23</sup> Moreover, veterans are also more likely to have preexisting mental health conditions that would be compounded by the mental health consequences of being forced to carry a pregnancy to term if that pregnancy is the result of rape or incest. Thus, abortion access is critical to protect the lives and health of pregnant veterans whose pregnancy is the result of an act of rape or incest.

As discussed above, even where Congress has restricted the circumstances in which other Federal agencies may provide abortions, Congress has allowed funding when the pregnancy is the result of an act of rape or incest. VA agrees that abortions for pregnancies resulting from rape or incest are, where sought by the pregnant veteran,

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<sup>22</sup> *Concluding observations of the Committee against Torture*, UNITED NATIONS COMMITTEE AGAINST TORTURE, 47th Sess., Oct. 31, 2011–Nov. 25, 2011 CAT/C/PRY/CO/4-6; Paraguay, p. 9, paragraph 22. [https://www2.ohchr.org/english/bodies/cat/docs/CAT.C.PRY.CO.4-6\\_en.pdf](https://www2.ohchr.org/english/bodies/cat/docs/CAT.C.PRY.CO.4-6_en.pdf).

<sup>23</sup> Carey Pulverman & Suzannah Creech, *The Impact of Sexual Trauma on the Sexual Health of Women Veterans: A Comprehensive Review*, TRAUMA VIOLENCE ABUSE. 22(4): 656-671 (Oct. 2021). doi: 10.1177/1524838019870912.

needed to protect the life and the health of the veteran consistent with the terms of 38 U.S.C. 1710. VA further expects that, in all but the most unusual circumstances, an individual's access to abortion in cases of pregnancy resulting from rape or incest would be "needed to promote, preserve, or restore the health of the individual" and would be "in accord with generally accepted standards of medical practice." 38 CFR 17.38(b).

#### D. Abortions for CHAMPVA Beneficiaries When Pregnancy is the Result of an Act of Rape or Incest Are Medically Necessary and Appropriate

For similar reasons as discussed above, VA has determined that access to abortion when the pregnancy is the result of an act of rape or incest is medically necessary and appropriate and must be available to CHAMPVA beneficiaries. Allowing abortions in these circumstances better aligns with TRICARE (Select), which also allows abortions when the pregnancy is the result of an act of rape or incest.<sup>24</sup>

VA has determined that this change will provide CHAMPVA beneficiaries with care that is medically necessary and appropriate.

### III. Abortion Counseling under 38 U.S.C. 1710 and 1781

#### A. Abortion Counseling is Needed Care for Veterans

Through this rulemaking, VA will remove the exclusion on abortion counseling in the medical benefits package from 38 CFR 17.38(c)(1). Abortion counseling is a part of pregnancy options counseling and is a component of comprehensive, patient-centered, high quality reproductive health care both as a responsibility of the provider and a right of the pregnant veteran. Abortion counseling has three purposes: (1) to aid a pregnant individual in making a decision about an unwanted pregnancy, (2) to help the pregnant

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<sup>24</sup> See *Covered Services, Abortions*, TRICARE, <https://tricare.mil/CoveredServices/IsItCovered/Abortions> (last visited Aug. 22, 2022); 38 U.S.C. 1781(b); and 32 CFR 199.1(r), 199.17(a)(6)(ii)(D).

individual implement the decision, and (3) to assist the pregnant individual in controlling their future fertility.<sup>25</sup>

Removing the exclusion on abortion counseling from 38 CFR 17.38(c)(1) will allow VA to provide abortion counseling services to veterans who receive the care set forth in the medical benefits package. Such counseling is essential to ensure that veterans may make informed decisions about their care. Studies have shown that individuals have limited knowledge about the safety and risks of abortion.<sup>26</sup> Providing veterans with accurate information about abortions is needed to ensure that they can make informed decisions about their health care. See *also* 38 U.S.C. 7331; 38 CFR 17.32.

Abortion counseling should no longer be excluded from the medical benefits package. The provision of abortion counseling will enable a pregnant veteran to make a fully informed health care decision, just as counseling is offered or covered by VA regarding any other health care decision. As such, abortion counseling will be provided as part of conversations a veteran has with their provider related to pregnancy options care, when appropriate.

#### B. Abortion Counseling is Medically Necessary and Appropriate for CHAMPVA Beneficiaries

Through this rulemaking, VA will remove the exclusion of abortion counseling from 38 CFR 17.272(a)(65). This will authorize the provision of abortion counseling for both covered and noncovered abortions to CHAMPVA beneficiaries. We acknowledge that this is broader than the abortion counseling provided under TRICARE (Select). However, the relevant care provided under CHAMPVA will still be sufficiently “similar” to

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<sup>25</sup> Asher, J.D., *Abortion counseling*. AMERICAN JOURNAL OF PUBLIC HEALTH, 63(5):686-8 (May 1972). <https://pubmed.ncbi.nlm.nih.gov/5024296/>.

<sup>26</sup> Ellen Weibe., et al., *Knowledge and Attitudes about Contraception and Abortion in Canada, US, UK, France and Australia*, GYNECOLOGY & OBSTETRICS, 5(9) (2015), <http://www.longdom.org/open-access/knowledge-and-attitudes-about-contraception-and-abortion-in-canada-us-uk-france-and-australia-40135.html>.

that provided under TRICARE (Select). 38 U.S.C. 1781(b). As explained previously, 38 U.S.C. 1781(b) does not require CHAMPVA and TRICARE (Select) to be administered identically. Rather, by referring to care that is “similar,” the statute permits VA flexibility to administer the program for CHAMPVA beneficiaries. For this reason, not every aspect of CHAMPVA will find a corollary in TRICARE (Select).

Indeed, as addressed throughout this rule, VA has previously provided CHAMPVA beneficiaries with health care services that exceed those services offered by TRICARE (Select). As discussed in the section above, abortion counseling will enable a pregnant CHAMPVA beneficiary to make a fully informed health care decision, just as counseling is offered or covered by VA when medically necessary and appropriate to make any other health care decision. Because providing CHAMPVA beneficiaries with accurate information about abortions is medically necessary to ensure that they can make informed decisions about their health and the care will be similar to that provided under TRICARE (Select), we believe it is appropriate to revise the CHAMPVA regulations to authorize the provision of abortion counseling for both covered and noncovered abortions to CHAMPVA beneficiaries.

Thus, VA finds that abortion counseling is beneficial for all CHAMPVA beneficiaries to receive accurate information about abortions. Therefore, we are including abortion counseling as a covered medical service under CHAMPVA.

#### IV. These Changes Will Promote Clarity and Parity Across Federal Agencies

VA believes it is important to provide at least the same reproductive health care services that other Federal agencies provide their beneficiaries. Many veterans and VA beneficiaries previously received health care from other Federal agencies, such as the Department of Defense, and those beneficiaries should have the same or greater access to services that they had previously and came to expect under other agency

policies. This is particularly true for our veteran patients who earned their VA health care benefits through their military service and sacrifice to this country. It is unconscionable that they would not have access to at least these same critical services following their transition to civilian life.

As a result of this rulemaking, VA will also provide abortions when the health of the pregnant veteran or CHAMPVA beneficiary is endangered in addition to when the pregnancy threatens their life. This difference is due to VA's particular statutory authority in 38 U.S.C. 1710 to provide needed health care for veterans and VA's flexibility in administering the CHAMPVA program under 38 U.S.C. 1781, as discussed throughout. In contrast, other Federal agencies have different statutory authorities and additional limitations concerning the services they provide, such as the Hyde Amendment discussed above.

In addition, some post-*Dobbs* State and local laws purport to impose criminal liability or threaten suspension of the medical licenses of providers who perform abortions without authorization.<sup>27</sup> In the absence of clarity as to exactly what care is covered, this may result in a chilling effect on the provision of care, including abortions, to veterans and CHAMPVA beneficiaries. Denial of care because of uncertainty about the scope of changing State laws has already been evidenced outside of the Federal health system in certain States.<sup>28</sup> ACOG warns that the full scope of abortion restrictions' effects includes how physicians' ethical obligations to their patients and to

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<sup>27</sup> See e.g., Ark. Code Ann. sec. 5-61-404 (making abortion an unclassified felony); Idaho Code Ann. sec. 18-622 (making abortion a felony and requiring suspension of medical license); La. Rev. Stat. Ann. sec. 40:1061 (making abortion a criminal act and basis for professional disciplinary action); Tenn. Code Ann. sec. 39-15-216 (2019) (making abortion a felony); Tex. Health & Safety Code Ann. sec. 170A.004-05 (making abortion a felony and subject to a civil penalty).

<sup>28</sup> See, e.g., Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES, July 21, 2022, <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html> (last visited Aug. 23, 2022).

the practice of medicine may be reshaped, redirected, or even contradicted by the threat posed by laws not founded in science or based on evidence.<sup>29</sup>

Consequently, VA is revising its medical benefits package and CHAMPVA regulations to promote clarity.

## V. Preemption and Related Principles

As previously described, as a result of *Dobbs*, States and localities have begun to enforce existing abortion bans and restrictions on care, and are proposing and enacting new bans or restrictions, creating urgent risks to the lives and health of pregnant veterans and the health of pregnant CHAMPVA beneficiaries in those States. Such State and local bans and restrictions on care chill the provision of needed care for veterans and medically necessary and appropriate care for CHAMPVA beneficiaries. For instance, the Texas Medical Association sent a letter to the Texas Medical Board, seeking clarity on the Texas abortion restrictions as it received complaints that in some health care settings, physicians have been prohibited from providing medically appropriate care to women with ectopic pregnancies and other complications.<sup>30</sup> As reported even before the *Dobbs* decision, there is a climate of fear created by these abortion restrictions that has resulted not only in patients not having access to needed care but also in patients receiving medically inappropriate care.<sup>31</sup>

Accordingly, VA clarifies that State and local laws and regulations that would prevent VA health care professionals from providing needed abortion-related care, as permitted by this rule, are preempted. VA previously issued a regulation, 38 CFR

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<sup>29</sup> *Breaking the Law or Breaking the Oath? How Abortion Bans Betray America's Patients and Physicians*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, <http://www.acog.org/education-and-events/webinars/acog-nyu-how-abortion-bans-betray-americas-patients-physicians> (last visited Aug. 22, 2022).

<sup>30</sup> Allie Morris, *Texas Hospitals Fearing Abortion Law Delay Pregnant Women's Care, Medical Association Says*, DALLAS NEWS, July 14, 2022, <http://www.dallasnews.com/news/politics/2022/07/14/texas-hospitals-fearing-abortion-law-delay-pregnant-womens-care-medical-association-says> (last visited Aug. 22, 2022).

<sup>31</sup> Whitney Arey, et al., *A Preview of the Dangerous Future of Abortion Bans — Texas Senate Bill 8*, N ENGL J MED; 387:388-390 (2022), <http://www.nejm.org/doi/full/10.1056/NEJMp2207423> (last visited Aug 22, 2022).

17.419, in which VA confirmed the ability of VA health care professionals to practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other requirements that unduly interfere with their practice. The regulation provides that, in order to “provide the same complete health care and hospital services to beneficiaries in all States . . . conflicting State laws, rules, regulations, or requirements pursuant to such laws are without any force or effect, and State governments have no legal authority to enforce them in relation to actions by health care professionals within the scope of their VA employment.” 38 CFR 17.419(c). Consistent with § 17.419, VA has determined that State and local laws, rules, regulations, or requirements that restrict, limit, otherwise impede access to, or regulate the provision of health care provided by VA pursuant to Federal law, would “unduly interfere[] with VA health care professionals’ practice within the scope of VA employment.” 38 CFR 17.419(b)(1). Accordingly, consistent with § 17.419, this rulemaking confirms that a State or local civil or criminal law that restricts, limits, or otherwise impedes a VA professional’s provision of care permitted by this regulation would be preempted.

In addition, “[t]he Constitution’s Supremacy Clause generally immunizes the Federal Government from State laws that directly regulate or discriminate against it,” unless federal law authorizes such State regulation. *United States v. Washington*, 142 S. Ct. 1976, 1982 (2022). Therefore, States generally may not impose criminal or civil liability on VA employees who perform their duties in a manner authorized by federal law. See, e.g., *In re Neagle*, 135 U.S. 1, 62 (1890). This rulemaking serves as notice that all VA employees, including health care professionals who provide care and VA employees who facilitate that health care, such as VA employees in administrative positions that schedule abortion procedures and VA employees who provide transportation to the veteran or CHAMPVA beneficiary to the VA facility for reproductive

health care, may not be held liable under State or local law or regulation for reasonably performing their Federal duties.

#### VI. Changes to 38 CFR 17.38(c)(1)

Based on the rationale described above, we remove the exclusion on abortion counseling from § 17.38(c)(1). We revise § 17.38(c)(1) by adding paragraphs (c)(1)(i) and (ii) to state that the medical benefits package includes abortions in certain circumstances.

Section 17.38(c)(1)(i) permits abortions when the life or health of the pregnant veteran would be endangered if the pregnancy is carried to term. Assessment of the conditions, injuries, illness, or diseases that will qualify for this care will be made by appropriate health care professionals on a case-by-case basis. As appropriate, VA may issue supplemental guidance to inform these decisions.

Section 17.38(c)(1)(ii) permits abortions when the pregnancy is the result of an act of rape or incest. We are not requiring a veteran to present particular evidence such as a police report to qualify for this care. This is consistent with longstanding VA policy to treat eligible individuals who experienced military sexual trauma without evidence of the trauma. This approach, similar to in the context of military sexual trauma, removes barriers to providing care. Therefore, the regulation will provide that self-reporting from the pregnant veteran constitutes sufficient evidence.

#### VII. Changes to 38 CFR 17.272

Based on the rationale described above, we amend the CHAMPVA regulations at 38 CFR 17.272. We remove § 17.272(a)(65) that excludes abortion counseling from the CHAMPVA program. We revise current § 17.272(a)(64), which excludes abortions



except when a physician certifies that the life of the pregnant beneficiary would be endangered if the fetus were carried to term, and we add § 17.272(a)(64)(i) and (ii).

Section 17.272(a)(64)(i) permits abortions when the life or health of the CHAMPVA beneficiary would be endangered if the pregnancy is carried to term. Assessment of the conditions, injuries, illnesses, or diseases that will qualify for this care will be made by appropriate health care professionals on a case-by-case basis. As appropriate, VA may issue supplemental guidance to inform these decisions.

Section 17.272(a)(64)(ii) permits abortions when the pregnancy is the result of an act of rape or incest. We are not requiring the CHAMPVA beneficiary to present particular evidence such as a police report to qualify for this care. This approach, as discussed above, removes barriers to providing care. Therefore, the regulation will provide that self-reporting from the pregnant CHAMPVA beneficiary constitutes sufficient evidence.

## VIII. Regulatory Requirements

### A. Executive Order 13132, Federalism

Executive Order 13132 establishes principles for preemption of State laws when those laws are implicated in rulemaking or proposed legislation. The order provides that, where a Federal statute does not expressly preempt State law, agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority directly conflicts with the exercise of Federal authority or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.

As discussed above, consistent with 38 CFR 17.419, State and local laws, rules, regulations, or requirements are preempted to the extent those laws unduly interfere with Federal operations and the performance of Federal duties. That includes laws that

States and localities might attempt to enforce in civil, criminal, or administrative matters against VA health care professionals acting in the scope of their VA authority and employment and that would prevent those individuals from providing care authorized by 38 U.S.C. 1701, 1710, 1781, 1784A, 7301, and 7310, and VA's implementing regulations. State and local laws, rules, regulations, or requirements are therefore without any force or effect to the extent of the conflict with Federal law, and State and local governments have no legal authority to enforce them in relation to actions by VA employees acting within the scope of their VA authority and employment.

Because all State and local laws, rules, regulations, or requirements that unduly interfere with VA's provision of reproductive health care have no force or effect, there are no actual or possible violations of such laws related to VA programs, operations, facilities, contracts, or information technology systems that would necessitate mandatory reporting by VA employees. 38 CFR 1.201-1.205. This rulemaking confirms VA's authority and discretion to manage its employees concerning the services that will be provided pursuant to this rulemaking.

Next, Executive Order 13132 requires that any regulatory preemption of State law must be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations that are promulgated. Under VA's regulations, State and local laws, rules, regulations, or other requirements are preempted only to the extent they unduly interfere with the ability of VA employees to furnish reproductive health care while acting within the scope of their VA authority and employment. Therefore, VA believes that the rulemaking is restricted to the minimum level necessary to achieve the objectives of the Federal statutes.

#### B. Administrative Procedure Act

The Administrative Procedure Act (APA), codified in part at 5 U.S.C. 553, generally requires that agencies publish substantive rules in the *Federal Register* for notice and comment and provide a 30-day delay before the rules becomes effective. An agency may forgo notice if the agency for good cause finds that compliance would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(B). An agency may also bypass the APA's 30-day delay requirement if good cause exists, 5 U.S.C. 553(d)(3), or if the rule "recognizes an exemption or relieves a restriction," 5 U.S.C. 553(d)(1). The Secretary of Veterans Affairs finds that there is good cause under the provisions of 5 U.S.C. 553(b)(B) to publish this rule without prior opportunity for public comment because it would be impracticable and contrary to the public interest and finds that there is good cause under 5 U.S.C. 553(d)(3) to bypass the 30-day delay requirement. The Secretary also finds that the 30-day delay is inapplicable as this rule is removing restrictions on abortion, in certain, limited circumstances, and on abortion counseling. 5 U.S.C. 553(d)(1).

As discussed at length above, leaving veterans and CHAMPVA beneficiaries without access to abortions and abortion counseling puts their health and lives at risk. Pregnancy and childbirth in the United States can result in physical harm or death to certain pregnant individuals,<sup>32</sup> as pregnant individuals may suffer from life-threatening conditions such as severe preeclampsia, newly diagnosed cancer requiring prompt treatment, and intrauterine infections,<sup>33</sup> and may have pre-existing conditions exacerbated by continuing the pregnancy.<sup>34</sup> In such cases, an abortion may be the only

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<sup>32</sup> Elizabeth G Raymond & David A Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012); see also Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues* 128 OBSTETRICS & GYNECOLOGY 447 (2016) (finding a 26.6 percent increase in maternal mortality rates between 2000 and 2014). Victoria L. Meah, et al., *Cardiac output and related haemodynamics during pregnancy: a series of meta-analyses*, HEART J., 102:518-526 (2016).

<sup>33</sup> *Abortions later in Pregnancy*, KAISER FAMILY FOUNDATION, Dec. 5, 2019, <http://www.kff.org/womens-health-policy/fact-sheet/abortions-later-in-pregnancy/> (last visited Aug. 22, 2022).

<sup>34</sup> Victoria L. Meah, et al., *Cardiac output and related haemodynamics during pregnancy: a series of meta-analyses*, HEART J., 102:518-526 (2016).

treatment available to save the health or life of the pregnant individual.<sup>35</sup> This is especially relevant because VA serves a population that is particularly vulnerable to adverse pregnancy outcomes. Pregnant veterans and CHAMPVA beneficiaries may be at heightened risk for pregnancy complications including hemorrhage, placenta accreta spectrum, and peripartum hysterectomy, among others.<sup>36</sup> Veterans of reproductive age, in particular, have high rates of chronic medical and mental health conditions that may increase the risks associated with pregnancy.<sup>37</sup> As lack of access to abortions can result in loss of future fertility, significant morbidity, or death, it is critical that veterans and CHAMPVA beneficiaries have access to abortions that are needed to save their lives and preserve their health. It is, without exception, an urgent and tragic event when pregnant veterans and VA beneficiaries face pregnancy-related complications that put their health or lives at risk. In such cases, the veterans, VA beneficiaries, and their families must be confident that their health care providers can and will take swift and decisive action to provide needed health care.

The ability of veterans and CHAMPVA beneficiaries to receive abortions through VA is especially critical following State attempts to further ban abortion, which put the health and lives of veterans and CHAMPVA beneficiaries at risk.

When VA implemented the exclusion on abortions in the medical benefits package in 1999, veterans and other CHAMPVA beneficiaries had access to abortions in their communities. However, in *Dobbs*, the Supreme Court overruled the constitutional protections recognized in *Roe* and *Casey*. *Dobbs* has had an immediate

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<sup>35</sup> *Abortion Can Be Medically Necessary*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, Sep. 25, 2019, <http://www.acog.org/news/news-releases/2019/09/abortion-can-be-medically-necessary> (last visited Aug. 22, 2022).

<sup>36</sup> ACOG Practice Bulletin No. 183, *Postpartum Hemorrhage*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Oct. 2017); ACOG Obstetric Care Consensus, *Placenta Accreta Spectrum* (July 2012, reaff'd 2021); ACOG Practice Bulletin No. 198, *Prevention and Management of Obstetric Lacerations at Vaginal Delivery*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Sept. 2018); ACOG Clinical Consensus No. 1, *Pharmacologic Stepwise Multimodal Approach for Postpartum Pain Management*, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (Sept. 2021).

<sup>37</sup> Joan L. Combellick, et al., *Severe Maternal Morbidity Among a Cohort of Post-9/11 Women Veterans*, J WOMEN'S HEALTH, 29(4):577–84 (Apr. 2020).

or near-immediate effect because several States had laws banning abortion that were triggered upon the overruling of *Roe*. *Dobbs* has also led States and localities to consider new restrictions on abortion. As of August 2022, many States appear to be enforcing bans on abortion that do not include, or have limited, exceptions for when the pregnancy is due to rape or incest. Other States have bans on abortions with limited exceptions that are poised to take effect imminently. Additional State legislatures are introducing bans on abortion with limited exceptions. While some State courts have temporarily blocked the implementation of abortion bans, litigation in those States remains ongoing and other State courts have declined to enjoin their State's abortion ban.<sup>38</sup> These developments have made it, and will likely continue to make it, very difficult for many veterans and CHAMPVA beneficiaries to receive needed abortions in their communities. Additionally, ongoing litigation challenging individual State abortion bans causes confusion about where abortion remains legally accessible.<sup>39</sup>

Thousands of veterans and CHAMPVA beneficiaries are or may be impacted by abortion bans and the state of confusion related to where abortion remains legal. According to the National Partnership for Women & Families, it is estimated that up to 53 percent of veterans of reproductive age may be living in States that have already banned or are likely to soon ban abortion following the *Dobbs* decision.<sup>40</sup> VA estimates that over 155,000 veterans ages 18 through 49 are potentially capable of pregnancy, enrolled in VA health care, and live in States that have enacted abortion bans or restrictions. Additionally, VA estimates there are more veterans who may be capable of

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<sup>38</sup> See, e.g., Katie Shepherd, Rachel Roubein, and Caroline Kitchener, *1 in 3 American women have already lost abortion access. More restrictive laws are coming.*, WASH. POST (Aug. 22, 2022, 3:36 PM), <http://www.washingtonpost.com/nation/2022/08/22/more-trigger-bans-loom-1-3-women-lose-most-abortion-access-post-roe/>; see also, e.g., Idaho Code Ann. sec. 18-622, 18-622(3)(a)(ii) (prohibiting abortion in all instances, only providing affirmative defenses in case of life or health of pregnant individual); La. Rev. Stat. Ann. sec. 40:1061 (providing limited exception for life or health to abortion prohibition).

<sup>39</sup> See, e.g., Ava Sasani and Emily Cochrane, *'I'm Carrying This Baby Just to Bury It': The Struggle to Decode Abortion Laws*, N.Y. TIMES (Aug. 19, 2022), <http://www.nytimes.com/2022/08/19/us/politics/louisiana-abortion-law.html>.

<sup>40</sup> *Issue Brief: State Abortion Bans Could Harm Nearly 15 Million Women of Color* NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (Jul. 2022), <http://www.nationalpartnership.org/our-work/economic-justice/reports/state-abortion-bans-harm-woc.html>.

pregnancy who are eligible for, but are not currently enrolled in or using, VA health care who could also be impacted by current and future abortion bans and restrictions imposed by the State in which they live. Additionally, based on VA data, almost 50,000 CHAMPVA beneficiaries may similarly be impacted.

Thus, State bans and restrictions on abortion present a serious threat to the health and lives of over one hundred thousand veterans and CHAMPVA beneficiaries who currently rely, or may rely in the future, on VA health care. These State laws will have an immediate detrimental impact on the lives and health of veterans and CHAMPVA beneficiaries who are unable to receive the care that was available before State restrictions following the *Dobbs* decision. This detrimental impact is underscored by the potential harmful effects associated with being denied an abortion, when an abortion is needed to protect the life or health of the pregnant individual, or in cases of rape or incest—as described in prior portions of this preamble.

It is critical that this rule be published and be made effective immediately to ensure pregnant veterans and CHAMPVA beneficiaries have access to this important care. Indeed, delaying the issuance of this rule would increase the risk to their health and lives and put care out of reach for some pregnant veterans and CHAMPVA beneficiaries entirely. Time is also of the essence because, after the *Dobbs* decision, many State laws have prompted providers to cease offering abortion services altogether; thus, many veterans and CHAMPVA beneficiaries would face delays (including travel and wait times) if they were required to obtain, outside the VA, the treatment permitted under this rule. Each day, pregnant patients in the United States, some of whom are veterans or CHAMPVA beneficiaries, find themselves in need of abortion services in accord with generally accepted standards of medical practice. Delaying that care for the time required for notice and comment rulemaking would result in substantial health deterioration and risk the lives of some pregnant veterans and

CHAMPVA beneficiaries. Allowing even one preventable death of a veteran or CHAMPVA beneficiary by limiting access to abortions is unacceptable.

For these reasons, the Secretary has concluded that ordinary notice and comment procedures would be impracticable and contrary to the public interest and there is good cause to issue this interim final rule with an immediate effective date. Accordingly, VA is issuing this rule as an interim final rule with an immediate effective date. As noted above, this interim final rule will have a 30-day comment period, after which the Secretary will consider and address the comments received in a subsequent *Federal Register* document announcing a final rule incorporating any changes made in response to the public comments.

#### C. Executive Orders 12866 and 13563

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at <http://www.regulations.gov>.

#### D. Regulatory Flexibility Act

The Secretary hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory

Flexibility Act, 5 U.S.C. 601-12. This is because the rule does not directly regulate or impose costs on small entities and because any effects on small entities will be indirect. On this basis, the Secretary certifies that the adoption of this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply to this rule.

#### E. Unfunded Mandates

The Unfunded Mandates Reform Act of 1995, see 2 U.S.C. 1532, requires that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### F. Paperwork Reduction Act

This rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-21.

### **List of Subjects in 38 CFR Part 17**

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and



recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on August 29, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

***Michael P. Shores,***  
Director,  
Office of Regulation Policy & Management,  
Office of General Counsel,  
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 17 as follows:

## **PART 17 – MEDICAL**

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.38 by revising paragraph (c)(1) to read as follows:

### **§ 17.38 Medical benefits package.**

\* \* \* \* \*

(c) \* \* \*

(1) Abortions, except when:

(i) The life or the health of the pregnant veteran would be endangered if the pregnancy were carried to term; or

(ii) The pregnancy is the result of an act of rape or incest. Self-reporting from the pregnant veteran constitutes sufficient evidence that an act of rape or incest occurred.

\* \* \* \* \*

3. Amend § 17.272 by:

a. Revising paragraph (a)(64).

b. Removing paragraph (a)(65).

c. Redesignating current paragraphs (a)(66) through (84) as paragraphs (a)(65) through (83).

The revision reads as follows:

### **§ 17.272 Benefits limitations/exclusions.**

(a) \* \* \*

(64) Abortions, except when:

(i) The life or the health of the pregnant beneficiary would be endangered if the pregnancy were carried to term; or

(ii) The pregnancy is the result of an act of rape or incest. Self-reporting from the pregnant beneficiary constitutes sufficient evidence that an act of rape or incest occurred.

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